The Research Director
Legal, Constitutional and Administrative Review Committee
Parliament of Queensland
Parliament House
George Street
BRISBANE Q. 4000

BAR ASSOCIATION OF QUEENSLAND

Madam,

RE: THE ACCESSIBILITY OF ADMINISTRATIVE JUSTICE

The Bar Association of Queensland extends its thanks to the members of the Legal, Constitutional and Administrative Review Committee for the indulgence shown to the Association in affording it further time within which to make a written submission to the Committee in relation to its inquiry into the Accessibility of Administrative Justice in Queensland.

According to the Committee's discussion paper, the focus of the inquiry is upon the effectiveness of the statutory mechanisms under the *Freedom of Information Act 1992* (**FOI Act**) and the *Judicial Review Act 1991* (**JR Act**). The following are issues upon which the Committee has invited discussion and submissions:

- the costs of access;
- the availability of information;
- access for a diversity of people; and efficiency of access.

The Association prefaces its submission by highlighting a noteworthy gap in Queensland's administrative justice system that a study of the focus of the present inquiry discloses – the absence of a comprehensive system for the review on the merits of State administrative decisions. That absence was noted as a feature of Queensland's then accountability mechanisms by Mr. G. E. Fitzgerald QC (as his Honour then was) in his seminal, 1989 Commission of Inquiry Report.[1] A sequel to that report was the establishment of the Electoral and Administrative Review Commission (**EARC**). One of EARC's last actions prior to its abolition was its

[1] Report of a Commission of Inquiry Pursuant to Orders in Council dated 26 May 1987, 24 June 1987, 25 August 1988 and 29 June 1989, p. 128.

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recommendation in 1993 that a generalist merits review body be established.[2] EARC's parliamentary oversight committee, the Parliamentary Committee on Electoral and Administrative Review supported that recommendation, albeit with a reservation as to the estimated cost of the implementation of the proposal.[3] The proposal was not adopted by the Legislative Assembly.

In 1999, the Committee recommended reconsideration of the proposal.[4] Regrettably, in the Association's respectful opinion, no such reconsideration has occurred. Review on the merits of administrative decisions in Queensland remains characterised by a plethora of different forums, each with idiosyncratic practices, and none with any institutional independence. While some consolidation was achieved upon the establishment of the Commercial and Consumer Tribunal pursuant to the *Commercial and Consumer Tribunal Act* 2003, Queensland still lacks anything resembling the general administrative review tribunal exemplified by the Commonwealth's highly successful Administrative Appeals Tribunal (**AAT**).

The constitutional background to the notion, fundamental to the AAT's jurisdiction, that it "stands in the shoes" of the primary administrative decision-maker[5] does not have the same resonance in Queensland, where the strict separation of powers doctrine highlighted federally by the *Boilermaker's Case*[6] does not apply. The ramifications of that difference, in terms of how best, if at all, to utilise the judicial branch of government in the protection of the citizen and corporation from arbitrary government decision-making have yet to be addressed.

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[2] EARC, Report on Review of Appeals from Administrative Decisions (1993) Vol 1, para 70, xxviii.

[3] Parliamentary Committee on Electoral and Administrative Review, *Report on Review of Appeals* from Administrative Decisions (1995).

[4] Legal, Constitutional and Administrative Review Commission, Queensland Parliament, *Report of*
the Strategic Review of the Queensland Ombudsman, rec 22.

[5] Contrast the invalid conferral of Commonwealth judicial power upon the former Taxation Board of Appeal in *British Imperial Oil Company v. Federal Commissioner of Taxation* (1925) 35 CLR 422 with the vindication of the replacement, administrative review model by the High Court (1926) 38 CLR 153 and the Judicial Committee(1930) 44 CLR 530. in *Shell Company of Australia Ltd v. Federal Commissioner of Taxation.*

[6] *R. v. Kirby; ex parte Boilermaker's Society of Australia* (1956) 94 CLR 254 (and see sub. nom. *Attorney-General v. The Queen* (1957) 98 CLR 529 for subsequent proceedings in the Judicial Committee).

The Association respectfully suggests that it is both timely and necessary that the Committee re-enliven consideration of the subject of merits review in Queensland. In the Association's opinion, the subject remains one of public importance and warrants a comprehensive inquiry and report to the Assembly by the Committee as soon as possible.

Access to administrative justice

Freedom of information – The Committee's discussion paper neatly highlights the conflicting considerations that are at large in relation to fees for FOI requests that do not relate to the personal affairs of an applicant – set the fee too high and the public interest served by openness in government is a chimera; set the fee too low or not at all and hazard the circumstance, unpredictable in nature or extent, that limited public resources will be consumed in the satisfaction of such an FOI request to the detriment of the opportunity cost of the agency's use of those funds.

Time has not yet eroded the memory of a system of government in our State where FOI was not possible at all, which system was shown to be conducive to official corruption. Realistically exercisable freedom of information access rights are part of the price that we as a society pay to minimise the prospect of a repetition of that experience. Official corruption lurks in dark corners of public administration. Exposed to the light of public scrutiny as facilitated by FOI it either withers and dies or never takes root in the first place. The same is the case with inefficient or insensitive public administration practices. The benefits that access under FOI brings are real but do not lend themselves to precise quantification. Further, the very existence of an enforceable right of access, even if but infrequently used, can by the unpredictability of that use, act as a deterrent to corruption or poor public administration.

The dilemma presented by the FOI fees and charges regime is not unique to FOI. A similar dilemma is presented in relation to court fees. Court fees must be set high enough to give pause for thought to the zealot or the vexatious but not so high as effectively to deny a citizen an ability to exercise what is nominally a birthright, access to equal justice according to law before an independent

judiciary. The notion, evident to an extent in the fees and charges regime applicable to the Federal Court of Australia and the Federal Magistrates Court, that a court is a costs centre available on a user pays basis, does violence to this birthright. In 21st century Queensland realistically exercisable FOI access is also now a birthright.

The present, time based search fees have about them an open-ended quality that is not conducive to efficient public record keeping. Equally, a regime based wholly on fixed fees may overcharge or discourage an access seeker to the detriment of the public interests described in the preceding paragraphs. A useful compromise between these ends would be to have a fee regime which provided for a time based access fee regime subject to a capped maximum, with that maximum, in turn, able to be increased for cause on application by an agency to the FOI Commissioner and on notice to the FOI applicant. Apart from agency cost implications, whether such an increase was warranted might be subject to a public interest and FOI applicant's ability to pay test. A benchmark for the capped maximum might be the filing fee to initiate a claim in the Supreme Court. Such a correlation would recognise that, in contemporary Queensland society, the public importance of a right of access under FOI was such that the premium put on the exercise of that access right was, save in those cases of a demonstrated and truly exceptional burden on public funds, no higher than that put on access to our State's superior court.

It is, of course, one thing to remove financial impediments to the ready exercise of FOI rights and quite another if, by virtue of the breadth of the exemption grounds, or the inadequacy of external merits review, the access right itself is a hollow one. Consideration of that subject lies beyond the scope of the Committee's present inquiry. On each of these bases there are though unsatisfactory features in the current regime which would lend themselves to discrete inquiry and report by the Committee.

Judicial review – The Association does not perceive any particular access difficulty in respect of the exercise of judicial review rights stemming from Supreme Court filing fees. The contrast between the State's fees and charges

regime and the comparable regime in the Commonwealth regime has already been remarked upon.

Availability of representation is a constraint on access to justice generally, not just in respect of the exercise of rights of judicial review. The ability to secure judicial review remedies in respect of administrative decisions forms an important part of our society's matrix of checks and balances against the arbitrary exercise of executive power. In a State which has a unicameral legislature in which the government of the day often enjoys a significant majority the importance of there being other checks and balances is enhanced. It is to the enduring credit of the Queensland Parliament that it recognised the importance of this by adopting via our *Judicial Review Act 1991* the procedural reforms in respect of judicial review rights effected in the Federal jurisdiction by the *Administrative Decisions (Judicial Review) Act 1977*. It is the experience of members of the Association that the exercise of these rights and the ability to exercise them has improved and continues to improve the quality of public administration in Queensland.

The challenging of decisions on administrative law error grounds is necessarily a subject calling for particular technical expertise on the part of both the person presenting a case and the person adjudicating it. There is a sharp distinction between the review of a decision on administrative law error grounds and review on the merits. In the Association's experience that distinction is rarely understood by laypersons in the absence of careful explanation by a trained professional. Even amongst general legal practitioners that distinction is not always appreciated. It is not just a matter of history that the jurisdiction to grant judicial review remedies is vested in the superior courts. It is in those courts and in those who regularly appear before them that the requisite expertise reposes.

Securing that expertise in representation comes at a cost, as does the provision of other professional services in our society. The public interest in the adequate provision of professional services in health has been a matter of particular controversy in recent times. The detriment to society in the absence of adequate provision for civil legal aid funding is more subtle but no less real. The ability for any citizen to appear for himself or herself before our courts is an important right.

However, the institution of proceedings founded upon a confusion between judicial review and review on the merits consumes limited judicial resources and equally limited public legal resources in the cost of responding to those proceedings.

Our judicial system is predicated upon the dispensing of justice according to law by an independent judiciary assisted in that task by the legal representatives of each party. In general, it works well in that circumstance. Further, such a system is cost effective to society. The "user pays" element is provided not by excessive court fees and charges but by the cost of the legal representation incurred by the parties. Under that system a judge cannot be both independent adjudicator and advisor to either party. The inquisitorial alternative of an "investigating judge" would require a massive increase in the public funding of the judicial branch.

Sometimes, lurking and perhaps not articulated, in the generality of a litigant in person's dissatisfaction with an administrative decision is an arguable administrative law error ground. In such cases the judiciary and the respondent government official and agency are put in a difficult position. For the judge to identify the error at the hearing is to depart to some degree from the role of independent adjudicator. If only so identified at the hearing a ready answer otherwise available to a respondent either in law or by the adducing of evidence may not immediately present itself whereas on reflection or with advance notice it might. It is the experience of members of the Association that such situations do arise in judicial review cases conducted by litigants in person. The case cited by the Committee in its discussion paper, *Stephenson v. Corrective Services Commission*[7] exemplifies this.

There are uncanny, if not wholly surprising, parallels between Queensland's experience with its modern judicial review system and that of the Commonwealth. One feature of the procedural reforms effected by each system is that it has empowered the weak and those with little to lose to challenge the might of the executive government. Challenges grounded upon the securing of personal liberty

[7] At 25-26, viz, [1999] QSC 103, Shepherdson J.

are the paradigm. In the Commonwealth sphere they are manifest in a plethora of migration law challenges. In the State sphere that manifestation is to be found in challenges to corrective services decisions. As resources are devoted to these causes the response of the executive government has been the same – the enactment of privative clauses, as exemplified in the State sphere within the *Corrective Services Bill 2006*. In turn, it is only to be expected that, at State level, the constraint sought to be placed on the exercise of judicial review rights by such clauses will see the efficacy of such clauses questioned before the court.

Against this background there are particular challenges for a Parliament committed to the preservation of the rule of law and the prevention of the vices that were exposed by the Fitzgerald Inquiry. The provision of civil legal aid in respect of judicial review matters may serve both to encourage some such litigation that would not otherwise occur but at the same time it should discourage other such litigation by the highlighting of the aptness or otherwise of judicial review as a remedy for a perceived wrong. One means therefore of enhancing access to administrative justice is via the provision of legal aid to serve that end.

Under the regime replaced by the *Judicial Review Act* questions of standing in respect of the mounting of certain public law challenges could be resolved by the provision of a "fiat" (permission) from the Attorney-General allowing the bringing of a relator action. The granting of such a fiat also served the useful purpose of offering an assessment as to whether there existed an arguable basis of challenge. These days, the more overtly politically partisan role apprehended to attend the office of Attorney-General would present particular difficulties for the granting of such a permission to the institution of a challenge to a government decision.

More liberal standing tests have to some extent diminished the importance that an Attorney's fiat had under the earlier regime. However, they have not diminished the utility of there being some form of filtering of cases coming forward for judicial review. Federally, a response to a volume of perceived spurious judicial review challenges has been the enactment of Part 8B of the *Migration Act 1958*, allowing for the awarding of costs against legal practitioners where there is no

reasonable prospect of success. While extreme examples of such cases make such a measure superficially attractive, there are many others where reasonable prospects, like beauty, lies in the eye of the beholder and where those prospects are more readily seen in hindsight than in prospect. The not uncommon phenomenon of majority decisions in public law cases in the High Court highlights why that is so. Further, it is possible under the general law in extreme cases of litigation instituted without reasonable cause to secure a costs order against a non-party.

Part 8B of the *Migration Act 1958* also contains a form of "filtering" regime in s. 486I, which provides:

> ***"Lawyer's certification***
> *(1) A lawyer must not file a document commencing migration litigation, unless the lawyer certifies in writing that there are reasonable grounds for believing that the migration litigation has a reasonable prospect of success.*
> *(2) A court must refuse to accept a document commencing migration litigation if it is a document that, under subsection (1), must be certified and it has not been."*

In the absence of an ability to secure legal representation, provisions such as this are nothing more than a crude means whereby the legislative branch of government tries to control access to another namely, to the judicial branch. However, coupled with an adequately funded civil legal aid regime, such a provision would serve the useful end not only of enhancing access to justice in worthy cases but also provide a form of "filtration" in respect of vexatious litigation. Were there to be an adequate civil legal aid system, the Association considers that there would be much to be said in favour of such an amendment to the *Judicial Review Act*.

In the experience of members of the Association, some "filtration" of ill-considered judicial review applications either before their inception or at an early point after filing is achieved by the exercise of responsible and diplomatic liaison with applicants, or as the case may be, their legal representatives, by the Crown Solicitor and his staff and by a prudent disposition on the part of client departments and agencies not to seek costs in return for the prompt discontinuance of proceedings. Such cases fall outside the list of judicial review

cases that have progressed through the courts that appears in the discussion paper. Likewise, there are other cases where the provision of candid, frank advice as to prospects from the Crown Solicitor, sometimes with the assistance of advice from the Bar, leads to the vacation of a decision either upon complaint by letter or shortly after proceedings are instituted.

Queensland is well served by a Crown Law Office that undertakes such a role as a matter of course and as a matter of professional pride. That role, often unseen by the Courts and the general populace, can and does diffuse conflict and save public money. It is a role that needs to be encouraged. To discharge it adequately requires the support not just of the Attorney-General (usually found in Queensland) but of the whole of the Ministry for the principle that there is utility in a Crown Law office that is never a mere cipher for other departments or agencies of State but rather the source of frank, independent legal advice.

To some extent, the Australian Government Solicitor discharges a similar role federally, but the scope for such independence and the benefits that brings is challenged by treating public legal advice as a commodity open for tender by departments and agencies. The experience of members of the Association is that there is a tendency where that occurs for some firms to become reticent about the provision of advice that may contradict sincerely held points of view within departments or agencies deciding tenders. Similar challenges are presented where departments or agencies maintain in-house legal advisers who seek to conduct litigation without the referral of it to the Crown Law Office.

The prospect of an adverse costs order has a chilling effect on all civil litigation where a costs power exists, not just judicial review litigation. A unique, Queensland modification of the Federal judicial review model is to be found in s. 49 of the *Judicial Review Act*.[8] This section modifies the usual "costs follow the

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[8] **49 Costs--review application**
(1) If an application (the costs application) is made to the court by a person (the relevant applicant) who--
(a) has made a review application; or
(b) has been made a party to a review application under section 28; or
(c) is otherwise a party to a review application and is not the person whose decision, conduct, or failure to make a decision or perform a duty according to law, is the subject of the application;

event" rule that ordinarily attends the exercise of a discretionary power to award costs in civil litigation. The Committee has, in its discussion paper,[9] highlighted some of the relatively few cases that have examined in detail the meaning of this section.

In the Association's experience, s. 49 is under utilised to serve its intended end of allowing the funding in the public interest of litigation to resolve controversies of public importance. A recent example of the utility of the section is provided by *Meizer v Chief Executive, Dept of Corrective Services & Anor.*[10] That case resolved significant issues relating to whether prisoners had a right to participate in prison programs and to what was embraced by the notion of a "decision under

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the court may make an order--
(d) that another party to the review application indemnify the relevant applicant in relation to the costs properly incurred in the review application by the relevant applicant, on a party and party basis, from the time the costs application was made; or
(e) that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.
(2) In considering the costs application, the court is to have regard to--
(a) the financial resources of--
(i) the relevant applicant; or
(ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and
(b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and
(c) if the relevant applicant is a person mentioned in subsection (1)(a)--whether the proceeding discloses a reasonable basis for the review application; and
(d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c)--whether the case in the review application of the relevant applicant can be supported on a reasonable basis.
(3) The court may, at any time, of its own motion or on the application of a party, having regard to--
(a) any conduct of the relevant applicant (including, if the relevant applicant is the applicant in the review application, any failure to prosecute the proceeding with due diligence); or
(b) any significant change affecting the matters mentioned in subsection (2);
revoke or vary, or suspend the operation of, an order made by it under this section.
(4) Subject to this section, the rules of court made in relation to the awarding of costs apply to a proceeding arising out of a review application.
(5) An appeal may be brought from an order under this section only with the leave of the Court of Appeal.
(6) In this section--
review application means--
(a) an application for a statutory order of review under section 20, 21 or 22;7 or
(b) an application for review under section 43;8 or
(c) an appeal to the Court of Appeal in relation to an order made by the court on an application mentioned in paragraph (a) or (b).

[9] At pp. 18 and 19.
[10] [2005] QSC 351, 1 December 2005, Douglas J.

an enactment". Though he dismissed the prisoner's application, Douglas J made an order under s. 49 of the *Judicial Review Act*, remarking:

"[14] These applications were treated as being of some general importance, likely to affect many applications that might be made by prisoners. The matter was adjourned to enable the applicant to be represented properly. The applicant is a long-term prisoner with extremely limited financial resources. This appears to be one of the first occasions that this Court has been requested to consider the effect of the decision in Griffith University v Tang on the ability of prisoners to seek judicial review of decisions of the Department of Corrective Services. It seems appropriate to me, therefore, to order, pursuant to s 49 of the Judicial Review Act, that the respondent indemnify the applicant in relation to his costs properly incurred in the review application in respect of the respondent's application pursuant to s 48 of the Judicial Review Act."

In other cases, where it is has been obvious that a judicial review case has been brought for humane, if ultimately unsuccessful, reasons s. 49 has been utilised so as to make no order as to costs.

At present, s. 49(2) offers limited guidance as to factors pertinent to the exercise of a benign costs discretion. There is undoubted utility in the retention of a discretion that is ultimately open-ended so as to accommodate exceptional cases or those with unique and unpredictable qualities that may arise in the future. The Queensland Public Interest Law Clearing House (**QPILCH**) has in the past suggested that further legislative guidance might nonetheless be given in relation to costs in judicial review cases.[11] The Association supports this suggestion, as experience to date does disclose a degree of reticence on the part of both the judiciary and the legal profession to utilise s. 49. The Association understands that QPILCH utilises guidelines to determine which cases ought to attract the limited legal aid funds available to it. Such guidelines might provide useful inspiration for the amendment of s. 49 so as more precisely to serve the ends of promoting in the public interest the judicial resolution of controversies of public importance.

There can also be a public importance in the judicial resolution of administrative injustice even though the impact of the case is confined to one individual. Australians place much emphasis on an individual having a "*fair go*". That popular phrase neatly summarises the key features of procedural fairness – an

[11] Discussion Paper, at p. 20.

opportunity to be heard before an unbiased decision-maker in respect of any issue adverse to interest before a decision is made. Those who have not secured such procedural fairness will probably secure a costs order on a judicial review application in any event. However, there are cases where, even though such a finding is not made, the applicant had reasonable grounds for the bringing of the challenge and its adjudication by an independent judiciary serves the socially useful result of defusing that individual's perception of administrative injustice. Yet whatever palliative effect such an adjudication has can be undone by the imposition of a costs order. At present, the tendency is for costs to follow the event in such cases with the judiciary then leaving to the executive the making of a value judgement as to whether the resultant costs order should be enforced. Yet a member of the executive whose administrative competence has been under question may be ill placed to exercise that benign discretion. The Committee may well consider that some further amendment of s. 49 is necessary to accommodate such cases by expressly identifying that as a basis upon which no order as to costs might be made.

Attention has been drawn in the discussion paper[12] to the phenomenon of public law litigation instituted as a result of liberalisation of standing tests burdening administrators with the costs of general discovery applications. Historically, discovery was only available exceptionally and by leave in relation to the former, prerogative writ based, judicial review regime, but the position under judicial review legislation is that the rules of court providing for discovery, or disclosure, apply just as much to litigation under those statutes as they do to any other civil litigation.[13] When it is recalled that judicial review is concerned with the procedure by which an administrative decision came to be made and with the true meaning of the statutory power concerned, not with the merits of the decision, and especially that the test for disclosure is the "directly relevant" test, the scope for disclosure is limited in judicial review cases. Further, judicial review legislation confers upon most persons affected by administrative decisions a right to require the provision of reasons in which the material before the decision-maker is

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[12] At p. 21.

[13] See *Australian Securities Commission v. Somerville* (1994) 51 FCR 38, at 45, where the position is fully discussed by the Full Court of the Federal Court.

identified. Respondents to judicial review applications frequently voluntarily prepare such materials in the form of an agreed bundle of documents. If disclosure as of right were confined to the identification of that material with further disclosure being available only by leave that, in the Association's opinion, would answer the identified concern as to costs while at the same time not diminishing the rights of an applicant.

In the Association's experience, another cause of a costs burden in relation to disclosure is the inadequate identification at the time a particular decision is made of the nature and extent of the material before a decision-maker. The remedy for that is in better public administration practice rather than in the elimination of any ability to secure disclosure.

The Committee has identified in its discussion paper classes of people who may have difficulty in securing access to administrative justice – women, Aboriginal and Torres Strait Islanders etc.[14] The experience of members of the Association is that such classes of person do experience such difficulty. To those listed by the Committee the Association would add those for whom English is a second language. More generally though, Australians on average incomes find it difficult to access administrative justice. Some forms of civil litigation are not foreclosed to the average Australian because it is practicable to undertake them on a speculative basis, most notably in relation to personal injuries suits. That is infrequently the case in relation to public law litigation. Further, even where some forms of legal aid are available to the disadvantaged, e.g. to Aboriginal and Torres Strait Islanders, a lack of awareness either of basic civil rights or even of that availability of legal aid may inhibit access to administrative justice.

Access to administrative justice is enhanced not just by the provision of legal aid but also by civic education, starting in primary school.

The Association takes this opportunity to commend the Committee for its proactive investigation of an issue of public importance and to assure the

[14] At p. 25.

committee of the Association's continued support for its work. Should the Committee have any enquiries concerning this submission those inquiries might be directed in the first instance to the Chairman of the Association's public law committee, Mr. J. A. Logan RFD, S.C. (ph 3236 2683) or to the Association's chief executive officer, Mr. D. L. O'Connor (ph. 3238 5100).

Yours sincerely,

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President